NO. 21153

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

LOUIS SANDERS, et al.,

Appellants,

vs.

JOHN ERRECA, et al.,

Appellees.

APPELLANTS' REPLY BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

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INTRODUCTION

Before proceeding to deal with the specific legal points sought to be raised by the Appellees in their brief, certain basic matters arising from the Appellees' brief should be first discussed, as they quickly lay bare the lack of merit inherent in the Appellees' position.

The Appellees, ultimately, rest their arguments on two propositions which are: (a) that a differentiation between taking of property and deprivation of a constitutionally protected right is "a distinction without a difference" (AB 5) [1/], and (b) a presupposition that Appellees acted within the scope of their discretion (AB 4).

As to the first of the Appellees' propositions, a mere reading of the Fifth Amendment is sufficient to dispose of it:

1/ The abbreviations used are: AOB - Appellants' Opening Brief, AB - Appellees' Brief, CT - Clerk's Transcript, and RT - Reporter's Transcript.

" . . . nor shall any person . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation."

Thus, if one were to accept the Appellees' argument that the words "taking" and "deprivation" draw a "distinction without a difference", then one would necessarily have to conclude that the framers of the Fifth Amendment to the United States Constitution created a meaningless redundancy. If the "taking" clause of the Fifth Amendment is the operative one, and is the same as the "deprivation" clause, then what purpose was served by the framers expressing a prohibition against each? Are we to conclude that the "deprivation" clause is a nullity? Appellees have read the "deprivation" clause out of the Fifth Amendment.

Passing beyond the above issue, we note Appellees' reliance on Norton v. McShane (1964), 332 F. 2d 855. But Appellees ignore the fact that the Honorable Robert F. Kennedy, then Attorney General of the United States, filed his uncontradicted affidavit in the District Court describing the Defendants' discretionary duties, and reciting the fact that such duties were in enforcement of orders of the U. S. District Court and the U. S. Court of Appeals.

Please compare that with the facts of the case at bench. Here, the Appellees have never brought anything before the court showing in any way that they were acting within the scope of their discretion. Neither this Court nor the District Court nor Appellants have been told until this day what the Appellees' discretionary duties might be and whether Appellees were exercising their discretion in the case at bench. In the District Court Appellees simply asserted that they were immune

without offering any evidence as to their discretion. 2/ In this Court, by their Brief, Appellees ask this Court to presuppose that they were so acting (see AB, p. 4, Question 2). Nowhere in the record is there a slightest shred of evidence supporting the Appellees' presupposition.

On the contrary, there was before the District Court, and there is now before this Court, the article by Appellee Houghteling, admitting plainly and repeatedly that the Appellees exercise no discretionary function whatever as to passage of condemnation resolutions. As to the Appellees' suggestions in their Brief that such article merely indicates that the Commission is "overworked" and "understaffed", it is submitted that such suggestions fly in the face of Mr. Houghteling's own language:

> "If the legislature and the people of California believe the Commission engages in much serious budget evaluation or that it directs the Division of Highways, let them no longer be deceived. What actually exists is a condition wherein the inmates run the asylum, with the Chief Inmate serving also as Chairman of the Board of Visitors." (Emphasis Mr. Houghteling's; p. 29 of Houghteling article).
>
> "It's a puzzle to me why the agenda should be crowded with petty technical decisions, such as . . . condemnation resolutions . . . these are mainly routine matters. . . . " (p. 31 of Houghteling article).

Appellants respectfully submit that the above written and signed

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2/ Please note that the trial court indicated that it would not even consider any showing that the Appellees in fact did not act within their discretion (see RT p. 25, line 20 through p. 26, line 6).

admissions of Appellee Houghteling, made voluntarily in the public press, are clear evidence of the fact that, whatever the theory may be, in fact and in practice the Appellees do not exercise any discretion as to passage of condemnation resolutions, but "routinely" do as told by the Division of Highways personnel.

Appellees suggest in their Brief that because of the "countless number of resolutions needed in this freeway oriented society", 3/ Appellees should in the name of "discretion" be permitted to "rubber stamp" such resolutions, assembly line fashion, with no thought, consideration, or discretion to be given to the individual resolutions. And if in a particular case the blow of the "rubber stamp" strikes some individual in an unlawful fashion thereby destroying the economic end product of a man's lifetime, that - argue the Appellees - is just too bad.

Thus, the Appellees' argument is self-contradictory. Discretion means the conscious exercise of judgment, a weighing, a thoughtful reaching of conclusions. But in the case at bench the Appellees claim an ex parte "discretion" which is blind to the facts, and calls for no consideration or weighing. In the end, the Appellees' claim of "discretion" offends not only established authority, but also the very meaning of the word.

3/ For all the utility of the seemingly ubiquitous freeways, Appellants express the fervent belief that our society has not yet been bulldozed into being "freeway oriented", whatever that means. In any event, it is submitted that our society's orientation toward the Constitution and the notion that all men are equal under the law, should be and is paramount, and more valid than any "freeway orientation".

Finally, it should be noted that Appellees address themselves only to the question of their supposed immunity under the Civil Rights Act, 42 U.S.C. §1983. Appellees completely overlook the fact that the instant case was brought also under authority of 28 U.S.C. §1331 which sustains U. S. District Court jurisdiction to deal with deprivations of rights by government officers. See Bell v. Hood (1946), 327 U.S. 678.

THE MOST RECENT AUTHORITY REJECTS IMMUNITY OF STATE OFFICIALS IN FEDERAL COURTS.

Earlier this year, the theory urged by the Appellees herein was considered in detail and squarely rejected. In reversing the decision of a District Court dismissing the action, the Circuit Court in Jobson v. Henne (1966, C.A. 2nd), 355 F.2d 129, 133-134, held:

> "Thus we reach the question whether these defendants by reason of their offices should be immune from the tort liability imposed by §1983. The Civil Rights Acts in general, and §1983 in particular, are cast in terms so broad as to suggest that in suits brought under these sections common law doctrines of immunity can never be a bar. Nevertheless, courts have narrowed the scope of these provisions by applying certain common law notions of official immunity from suit; it is now clear, for example, that the common law immunity from suit afforded legislative and judicial officers continues to have force in suits brought under the civil rights provisions. (Citation)
>
> "It should be equally clear that both the language and the

purpose of the Civil Rights Acts are inconsistent with the application of common law notions of official immunity in all suits brought under these provisions. (Citation) In suits brought under §1983 an indispensable element of a plaintiff's case is a showing that the defendant (or defendants) acted 'under color of any statute, ordinance, regulation, custom of usage, of any state * * * .' 42 U.S.C. §1983. This test can rarely be satisfied in the case of anyone other than a state official. (Citation) To hold that all state officials in suits brought under §1983 enjoy an immunity similar to that they might enjoy in suits brought under state law 'would practically constitute a judicial repeal of the Civil Rights Acts.' (Citation) Furthermore, and perhaps more basically, the purpose of §1983 as well as the other Civil Rights provisions is to provide a federal remedy for the deprivation of federally guaranteed rights in order to enforce more perfectly federal limitations on unconstitutional state action. To hold all state officers immune from suit would very largely frustrate the salutary purpose of this provision. We conclude the defense of official immunity should be applied sparingly in suits brought under §1983. (Citation)" Jobson v. Henne, 355 F.2d at 133-134.

It should be noted that in Jobson the Second Circuit relied on the holding of this Court in Robichaud v. Ronan (1965, C.A. 9th), 351 F.2d 533, in which this Court, holding a prosecutor liable, stated at p. 536:

"Section 1983, first enacted in 1871, was intended to provide a remedy to persons subjected to '[m]isuse of power,

possessed by virtue of state law and made possible only because the wrong-doer is clothed with the authority of state law, * * * ' (citations). Thus, if immunities are broadly granted to state officers without consideration of the nature of their alleged misdeeds and the reason for the immunity, the statute becomes subject to circumvention, if not emasculation."

The conclusion of this Court in Robichaud is particularly appropriate vis-a-vis the Appellees' presupposition of "discretion":

"The title of office, quasi-judicial or even judicial, does not, of itself, immunize the officer from responsibility for unlawful acts which cannot be said to constitute an integral part of judicial process." Robichaud, supra, 351 F. 2d at 537-538 (emphasis added).

In summary, three United States Courts of Appeals in three different Circuits, have recently examined the question of whether state officials are immune from the exercise of the judicial power of the United States in actions brought in federal courts under the Civil Rights Act. All three Circuits, including this one, agreed that the immunity possessed by legislators and judges does not extend to state administrative officials.

Jobson v. Henne (1966, C. A. 2nd), 355 F. 2d 129, 133-134.

Robichaud v. Ronan (1965, C. A. 9th), 351 F. 2d 533, 537-538.

Progress Development Corp. v. Mitchell (1961, C. A. 7th),

286 F. 2d 222, 231. [4/]

We respectfully submit that the above recent determinations of the U. S. Courts of Appeals, combined with a long established line of U. S. Supreme Court cases cited and quoted in Appellants' Opening Brief (pp. 14, 15, 16, A1 - A13), make it abundantly clear that the immunity sought by the Appellees herein simply does not exist.

APPELLEES ARE NOT LEGISLATORS AND CANNOT CLAIM LEGISLATIVE PRIVILEGE

In order to squeeze themselves somehow within the rule of Tenney v. Brandhove, Appellees assert (AB 17 et seq.) that their acts are legislative in nature, and therefore they too should have the status of legislators.

To accomplish this remarkable result, Appellees raise an argument which upon examination collapses for reasons of both omission and commission. The omission has reference to Appellees ignoring of Article III, §1 of the California Constitution, the separation of powers provision, which expressly prohibits any person charged with the exercise of powers of one of the governmental departments from exercising any functions or pertaining to the other branches of government.

The Appellees are employees or officials of the Department of Public Works. They are therefore members of the executive department. They are not legislators, they have nothing to do with the

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4/ Appellees seek in their brief (AB 12) to distinguish Mitchell by suggesting that the taking therein was not for public use. Such suggestion is incorrect. See Deerfield Park District v. Progress Development Corp. (1962), 26 Ill. 2d 296, 186 N. E. 2d 360.

Calif. Water Code Appendix, §21-5) are possessed of the same immunity as members of the State Senate conducting a legislative investigation?

THE CONSTITUTION PROTECTS AGAINST DEPRIVATION OF RIGHTS AS WELL AS AGAINST PHYSICAL TAKING OF LAND

The Appellees argue that the only way in which a person can recover for injury to his property interests is by showing a physical taking or invasion of his land. The Appellees sneer at constitutional prohibition against deprivation by asserting that to seek protection against deprivation of rights as opposed to a taking, is to raise a "distinction without a difference".

Such argument of the Appellees flies in the face of the express language of the Fifth Amendment. But going beyond the language of the Constitution, the federal appellate reports abound in cases in which judicial redress was provided for deprivation of rights in the absence of any "taking".

For example, in Hornsby v. Allen (1964, C.A. 5th), 326 F.2d 605, and in Glicker v. Michigan Liquor Control Division (1947, C.A. 6th), 160 F.2d 96, nothing was "taken" from the Plaintiffs. The allegations in those cases were that the Plaintiffs were deprived of their right to secure liquor licenses. In both of the above cases the Plaintiffs prevailed.

In Lee v. Hodges (1963, C.A. 4th), 321 F.2d 480, nothing was "taken" from the Plaintiff. Instead, the Plaintiff was deprived of his right to use public school facilities on like terms with other members of the public, thereby causing the Plaintiff an economic injury.

In McGuire v. Sadler (1964, C.A. 5th), 337 F. 2d 902, again nothing was "taken" from the Plaintiff. There the Plaintiff alleged that the Defendant government officials were attempting or threatening to deprive the Plaintiff of his rights in a parcel of land by selling such land.

Likewise in Marshall v. Sawyer (1962, C.A. 9th), 301 F. 2d 639, there was no "taking", but a deprivation. To the same effect, Adams v. City of Park Ridge (1961, C.A. 7th), 293 F. 2d 585.

But undoubtedly the best illustration of the distinction between a taking of land and deprivation of rights secured by the Constitution can be seen in Progress Development Corporation v. Mitchell (1961, C.A. 7th), 286 F. 2d 222. In that case, the Plaintiffs' land was taken by eminent domain. For such taking there was a judicially determined payment of just compensation. See Deerfield Park Dist. v. Progress Development Corp. (1962), 26 Ill. 2d 296, 186 N.E. 2d 360. And yet, the Plaintiffs therein were also held entitled - entirely, separately and apart from the just compensation for the taking - to recover damages in federal court for the deprivation of their rights.

In short, Appellees' unsupported assertions notwithstanding, the Constitution protects against an uncompensated taking and it also protects against deprivation of one's rights. These are two distinct and separate matters.

Appellees seek to suggest to this Court that Appellants' Complaint is based upon a claim of damages arising from the mere passage of the condemnation resolution by the Defendants. The Appellees' suggestion is incorrect; it is a grand attack on a non-issue.

At no time did the Appellants claim that the mere passage of the

condemnation resolution gave rise to this action. To the contrary, Appellants expressly recognized that the normal period of time between the passage of a condemnation resolution and the institution of court proceedings may give rise to problems, which were not complained of (RT 22).

Appellants' position is that the condemnation resolution was not a real one; it was part of a bad faith scheme to prevent Appellants from using and developing their own land, so that when the State at some future time, decided to acquire what it did need and want, it would then be able to take Appellants' land cheaply, having first destroyed much of such land's value by freezing any use or development of such land.

The original condemnation resolution passed by Defendants was never implemented; it was never intended to be implemented. The condemnation proceeding, when it finally came in the State court under the prod of this action, was for a taking of only a small portion of the area described in the sham resolution.

In short, what the Appellees did, was not any normal or even slow institution of the condemnation proceedings against Appellants' property. What Appellees did was a scheme involving coercive threats, fraudulent misrepresentations, and the passage of a sham resolution which was never intended to be implemented. All this was done for the purpose of coercing Appellants into stopping construction of their shopping center. Thereby, Appellants were grievously damaged. Such damage, it is submitted, is a clear deprivation of Appellants' rights to use, enjoy, and develop their property without interference.

Land is worthless and useless if one cannot use it and develop it.

In the case at bench Appellants were prevented from using, enjoying, or developing their land by Appellees' fraudulent threats, and the bad faith resolution which was never implemented, nor intended to be implemented. Thereby Appellants were deprived of a property right. Such deprivation is violative of the Fifth and Fourteenth Amendments.

SOUND PUBLIC POLICY REJECTS IMMUNITY

Before addressing oneself to policy arguments with regard to immunity, it is helpful to restate just what the concept of immunity actually means. Please note that Appellees do not claim "privilege", which is what was established in Tenney. Appellees claim "immunity", a total imperviousness to the exercise of the judicial power of the United States. 6/ They say the federal courts are impotent to punish their admitted wrongdoing.

The Appellees' theory, stated simply, is that there walk among us men who, when acting under color of their office, are free to inflict injuries upon the person and property of others, and when called upon to answer for their deeds, can literally and figuratively thumb their noses at their victims, the courts, the law, and all other constituted authority.

6/ Appellees' statement (AB 5) that they do not seek to arrogate to themselves the divine rights of kings is quite wrong. This is exactly what they seek, and more. At least some monarchs felt subject to ecclesiastical authority (e.g., see the 1077 A.D. trip of Henry IV, Holy Roman Emperor, in sackcloth and ashes, to Canossa to beg forgiveness of Pope Gregory VII). But Appellees herein want for themselves a total immunity, with no one to answer to.

It is submitted that the Appellees' theory offends reason and outrages the most rudimentary notion of justice.

To be sure, Appellants, recognizing the harsh reality of life, do not deny that privilege exists in our society. Indeed, the United States Constitution expressly grants a privilege from process to members of the Congress. By analogy, such privilege has been judicially extended to members of State Legislatures.

Recognizing all of the above, the question is - just how far into the hierarchy of state government does this privilege descend? It must be recognized as a fact of life that state governments have been, within the recent past, undergoing explosive growth. The states and their various agencies and subdivisions have proliferated to the point where thousands of men with impressive titles sit in well-appointed offices from which they wield segments of the state power. Are all these men free to ride roughshod over their fellow citizens, with no remedy to be had?

The answer, it is submitted, must be and indeed has been in the negative. Purely on policy grounds, to grant to the ever-growing numbers of state officials the "immunity" argued for by the Appellees herein, would be to create a kind of aristocracy, placed above the citizenry, without standards for their conduct, and unchecked in their acts by man, government or law.

But more than policy requires that such "immunity" be rejected. The Federal Constitution and laws enacted by the Congress expressly place limitations on the States. The Constitution by Article VI thereof, declares itself and the laws of the United States to be the supreme law

of the land. One is, therefore, forced to return to the inescapable conclusion that if appointed, privileged members of state agencies can disregard the Constitution and the laws of the United States passed by Congress, and then hide behind their "immunity", then undisputably the Constitution, the courts and the laws of the United States are relegated to a subordinate position, with the will or "discretion" of a state official supreme. Such result has been repeatedly rejected by the United States Supreme Court. Appellants respectfully submit that such result is not only unacceptable legally, but is intolerable in a nation which prides itself on equality of men under law.

> "The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection. In Great Britain the king himself is sued in the respectful form of a petition, and he never fails to comply with the judgment of his court."
>
> Marbury v. Madison (1803) (U.S.), 1 Cranch 137, 163.

The Appellees make their own policy arguments and say that it will not do to have state officials "harassed" by litigation. 7/ But manifestly, this argument applies to every person, not just state employees. Any person can find himself a defendant in an unjustified lawsuit. And if the lawsuit is indeed unjustified, it is a simple matter to dispose of it.

7/ In this connection please note that should Appellees be ultimately found liable herein, they will not have to pay the judgment out of their own resources. Inasmuch as Appellees are being defended by a state public entity (see RT 36), such entity has voluntarily elected to pay the judgment (see §825 California Government Code).

All of us bear this risk. Surely Appellees cannot contend that each action or decision of a state highway commissioner or right-of-way agent is fraught with such significance and far-reaching effect as to transcend the compelling principle that each man is answerable for his acts. This point is best seen when one recalls that in the boardrooms of major corporations, decisions are frequently made of great impact on the country. For example, pricing decisions in the basic industries, such as steel or automobiles, can easily set off economic forces with highly beneficial or destructive consequences to the entire country. And yet the men who make these decisions - the corporate directors - are answerable to the law for their misdeeds, if any there be.

> "Administrative time is probably not yet deemed to be uniformly so precious as to preclude even the drain thereon that would be necessitated by the defense of substantial and successful suits; and for the time so lost the public may well find its compensation in the added incentive to administrative integrity and the exercise of due care and diligence in the first instance."
>
> 21 Minn. Law Review 306.

Some of the policy arguments urged by the Appellees suggest that privilege must be granted to state officials so that vexatious suits will not be brought against them along with well-founded ones. 8/ Such argument asks this Court to proverbially "throw out the baby with the bath water". Surely, our society can entrust to its judiciary the task of

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8/ Such arguments have been termed by writers "an amorphous mass of cumbrous language". 29 N. Y. U. L. R. 1363-1364; 36 Wash. L. R. 313-314.

separating the wheat from the chaff, of throwing the unfounded lawsuits out of court and allowing the valid ones to proceed on the merits.

In the end, our society, can only benefit from the rule that all of its members, regardless of their position, are bound by the law. Appellants submit that it is no overstatement to say that in any society the supremacy of law over unbridled and unredressed misdeeds of individuals can be summed up in one word - civilization.

CONCLUSION

Appellants submit that the District Court herein erred when it dismissed Appellants' Complaint. In applying the immunity doctrine, the District Court not only lacked precedent upon which to sustain its ruling, but proceeded directly contrary to authority. The U. S. Supreme Court and U. S. Court of Appeals cases cited and discussed in Appellants' briefs herein make it abundantly clear that as to state officials, liability is the rule; privilege is the rare exception. The privilege carved out by the U.S. Supreme Court for state legislators engaged in an intra-legislative activity in Tenney v. Brandhove was carefully circumscribed by the Supreme Court which made it clear that the privilege there was a narrow one, applicable only to that case.

Appellees seek in this case an explosive expansion of privilege. They seek to convert the carefully circumscribed privilege of legislators into an absolute immunity of a multitude of state officials and employees. Precedent and sound public policy compel the conclusion that Appellees' theory lacks merit and should be rejected.

Going beyond the issue of immunity, Appellees seek to convince

this Court that when a state official acting under the color of his office, and using the color of that office as a tool makes threatening, coercive, and fraudulent misrepresentations to a citizen, thereby preventing that citizen from using, enjoying, and developing his land, that no constitutional rights have been violated. Again, Appellees' suggestion lacks merit. Land that cannot be used is valueless. And clearly, one can be prevented from using one's land by threats just as effectively as by physical acts. Restatement of Torts, in commenting on §767, states at page 66:

> "Litigation and the threat of litigation are powerful weapons. When improperly instituted, litigation entails harmful consequences to the public interest and judicial administration as well as the act or adversary. The use of these weapons of inducement is ordinarily unprivileged if the actor has no belief in the merit of the litigation or if, though having some belief in its merits he nevertheless institutes or threatens to institute litigation in bad faith. . . . "

The above words of the Restatement describe the actions of Appellee Pedley to perfection. He knew that litigation could not be instituted when he made his threats. His means were tortious; his object an unconstitutional deprivation of Appellants' property rights.

The above reference to Pedley's acts, brings to mind the fact that it is conceded that neither Pedley nor Erreca are members of the Highway Commission, and, therefore even under the District Court's ruling not entitled to be shielded by the immunity claimed by the Appellees.

One final point should be touched on before concluding. What of justice? The briefs herein speak of rules of law, precedents and policy, and, yet, perhaps that is not enough. Appellants submit that ultimately, in a civilized society, men come to courts and stand before judges in a quest for justice. But admittedly, no justice was done in the case at bench. This was expressly recognized by the District Court (RT 34):

> "THE COURT: . . . I am telling you, again, it is because I don't think I have the power to act; that is the reason. If I thought -- I wish I did have the power. I wish I could rule in your favor because I can sense as clearly as you can the injustice of these situations and I would welcome a reversal in this case."

Thus, the trial court felt itself somehow powerless to do justice. One is therefore reminded of the words of Mr. Justice Cardozo:

> "Judges march at times to pitiless conclusions under the prod of a remorseless logic which is supposed to leave them no alternative. They deplore the sacrificial rite. They perform it nonetheless, with averted gaze, convinced as they plunge the knife that they obey the bidding of their office. The victim is offered up to the Gods of Jurisprudence on the altar of regularity. . . . I suspect that many of these sacrifices would have been discovered to be needless if a sounder analysis of the growth of law, a deeper and truer comprehension of its methods, had opened the priestly ears to the call of other voices."
>
> Cardozo, The Growth of the Law (1924), page 66.

This Court has been confronted with a wrong which Appellants ask to be righted. Appellants look to the courts as a place where merits of controversies are to be weighed and judged; a place where no man by virtue of his status or power can arrest the dispensation of even-handed justice.

Appellants respectfully urge this Court that it reverse the Order of the U. S. District Court, appealed from.

Respectfully submitted,

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By: GIDEON KANNER

Attorneys for Appellants

CERTIFICATE

I certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Gideon Kanner

GIDEON KANNER